UT Neutral citation number: [2022] UKUT 00219 (IAC)

Batool and others (other family members: EU exit)

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at Field House

THE IMMIGRATION ACTS

Heard on 31 March 2022
Further written submissions on 26 April and 11 May 2022
Promulgated on 19 July 2022

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE LESLEY SMITH

Between

(1) GHULAM BATOOL
(2) MUHAMMAD ALI
(3) MUHAMMAD ABEER
(4) HAIDER SULTAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the appellant: Mr R De Mello and Mr R Ahmed, Counsel, instructed by jJ Law Chambers
For the respondent: Ms J Smyth, Counsel, instructed by Government Legal Department

(1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

(2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member.

DECISION AND REASONS

A. INTRODUCTION

1. This appeal concerns the position of those who are, or claim to be, "other family members" within the meaning of Article 3.2 of Directive 2004/38/EC ("the Directive"), in the light of the departure of the United Kingdom from the European Union and in the context of the EU Settlement Scheme ("EUSS"). We are grateful to Mr De Mello, Mr Ahmed and Ms Smyth for their helpful written and oral submissions.

2. The first and second appellants are sister and brother, aged 17 and 10 at the date of the application to the respondent. The father of the first and second appellants is Chaudhary Ghulam Shabbir. The third and fourth appellants are brothers, aged respectively 13 and 10 at the date of the application. Their father is Muhammed Amir Chaudhry.

3. The parental grandparents of the appellants were issued with EUSS family permits in January 2020, in reliance on the grandparents' relationship with Persida Sultan, a Romanian national. Persida Sultan is the daughter-in-law of the grandparents, being married to their son, Zahoor Sultan (who is the brother of the appellants' fathers). Zahoor Sultan is, accordingly, the paternal uncle of all four of the appellants; and Persida Sultan is their aunt by marriage.

4. Having been granted their EUSS family permits, the grandparents entered the United Kingdom on 17 July 2020. They were granted limited leave to remain under Appendix EU on 23 September 2020 (grandfather) and 2 October 2020 (grandmother).

5. The appellants made their applications to the respondent on 3 February 2020. The applications were made under the EUSS by reference to Appendix EU (Family Permit) to the Immigration Rules ("Appendix EU (FP)"). At that time, the appellants were living in Pakistan with their

grandparents. After those grandparents travelled to the United Kingdom, the appellants were living with a woman from their village who was employed to look after them.

6. On 21 December 2020, Zahoor Sultan took the grandparents back to Pakistan.

7. The appellants' applications were refused by the respondent on 20 February 2020 on the basis that none of them met the eligibility requirements for an EUSS family permit. This was because, unlike the grandparents, the appellants were not family members of Persida Sultan for the purposes of the EUSS.

B. THE APPEALS

8. The appellants appealed against that decision, pursuant to regulation 3 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Appeals Regulations"). Their appeals were heard by First-tier Tribunal Judge Higgins on 7 June 2021.

9. At paragraph 8 of his decision, the First-tier Tribunal Judge recorded that the appellants' representative acknowledged that "none of the appellants could meet the eligibility requirements in Appendix EU (Family Permit) of the Immigration Rules for the reason the ECO had identified". The Judge's decision continues as follows:

> "9. Since the decisions against which the Appellants had appealed were, Mr Makol conceded, in accordance with the withdrawal agreement and the Immigration Rules, the sole basis on which the appeals would now be presented was that the ECO's decisions were incompatible with the respect for private and family life the Appellant's enjoyed to which they are entitled by Article 8 of the European Convention on Human Rights and, for that reason, unlawful by virtue of section 6 of the Human Rights Act 1998.
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> 10. Mr Makol accepted that the relevant family life had to be family life the Appellants enjoyed with the relevant EEA national and her husband, that is with Zahoor and Persida Sultan. Mr Makol also accepted that the appeal in the form in which it would now be presented had never been the subject of explicit consideration by an ECO and was a new matter for the purposes of section 85(5) of the Nationality, Immigration and Asylum Act 2002.
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> 11. The presenting officer, Mr Yeboah, agreed. He requested that he be afforded an opportunity to consult a senior caseworker and, having done so, told me the ECO consented to the new matter being determined by the Tribunal and Mr Yeboah told me he was in a position to proceed."

10. Having considered various witness statements, and following the discovery that Persida Sultan was unable to give evidence in English (paragraph 20), the decision continued as follows:

"21. The first, and crucial, issue it was agreed I have to determine is whether family life exists between the Appellants and their paternal uncle and his wife in the UK for the purposes of Article 8. It is for the Appellants to establish, more likely than not, it does. If it does not, the refusals to grant family permits would not have interfered with any family life the Appellants enjoyed.

22. The application for a guardianship certificate in March 2020 was plainly not made to facilitate the issue of passports to the Appellants, as Zahoor Sultan suggested, because they had been issued with passports in September 2019. I consider it more likely the application for a guardianship certificate was made because it was thought there might be some advantage in doing so in the context of the Appellants' appeals.

23. Mr Yeboah did not accept that the order purportedly recording a decision to issue the Appellants' grandfather with a guardianship certificate was necessarily authentic because of the manner in which it is phrased. But irrespective of the guardianship certificate, I accept the Appellants were, and remain, to some degree dependent on their paternal grandfather, and I do not doubt that family life exists between their grandparents and them.

24. I also accept, as indeed an ECO was satisfied, that the Appellants' grandparents are to some degree dependent on monies they received from Zahoor and Persida to meet their essential needs.

25. The Appellants' grandparents have put themselves in the unenviable position of having to choose whether to live in the UK with their son and daughter-in-law or remain in Pakistan with their grandchildren. But the First and Second Appellants' mother is in Pakistan living with her family, the Third and Fourth Appellants' mother similarly, and the Third and Fourth Appellants' father could return to Pakistan from Saudi Arabia to oversee his children's care

26. Convenient as it may be for the Appellants to live with their grandparents and uncle in the UK, they have not satisfied me that the emotional ties that exist between them and their uncle and his wife in the UK are significantly closer or stronger than the emotional ties which conventionally exist between an uncle and his nephews and nieces; and since they have not satisfied me that they enjoyed, or currently enjoy, family life with their uncle and aunt in this country, refusal of family permits did not interfere with any family life they enjoyed. The decisions against which they have appealed are, I am satisfied, entirely compatible with respect for their family and private life to which the Appellants are entitled by Article 8 of the ECHR and for those reasons I dismiss the appeals."

11. Permission to appeal was granted by the First-tier Tribunal on 6 September 2021. There has since been case management by the Upper Tribunal, in light of the fact that it was considered these appeals might raise issues of general significance.

C. LEGAL FRAMEWORK

12. In light of the volume and complexity of the legislative framework surrounding these appeals, we have set out the provisions which are relevant to the arguments in an Annex to this decision.

D. THE APPELLANTS' CASE

13. Mr De Mello advances the appellants' case as follows. As a matter of domestic law, the appellants do, in fact, fall within the scope of the expression "family member of a relevant EEA citizen" in Appendix EU (FP). Those immigration rules fall to be interpreted in the light of the Agreement on the withdrawal of the United Kingdom and Great Britain and Northern Ireland from the European Union etc ("the Withdrawal Agreement"). Decisions of the Court of Justice of the European Union as to who constitute "other family members" within Article 3(2) of the Directive are binding on courts and tribunals by reason of Article 4 of the Withdrawal Agreement.

14. Mr De Mello places particular emphasis in this regard on the judgment of the CJEU in SSHD v Rahman and Others [2013] QB 249; [2013] Imm AR 73 ("Rahman"), in which the Court set out the obligations on Member States in respect of facilitating the entry and residence of other family members within Article 3(2)(a) of the Directive.

15. The appellants contend that other family members who have applied for a residence card or immigration document fall within the scope of the Withdrawal Agreement; specifically, Article 10(3). Pursuant to Article 10(5) they are accordingly entitled to be issued with a residence document. Article 7 of the Withdrawal Agreement applies to "provisions of Union law made applicable by this Agreement". This includes Article 3(2) of the Directive, referred to in Article 10(3) of the Withdrawal Agreement.

16. Mr De Mello contends that Article 18 of the Withdrawal Agreement requires the United Kingdom to issue residence documents to family members and "other persons", that expression being a shorthand for extended family members and those in a durable relationship.

17. The appellant made a relevant application, which resulted in an appealable decision under the 2020 Appeal Regulations. The grounds of appeal asserted "although obliquely" that the appellants were family members. The First-tier Tribunal was, accordingly, bound to decide that question as it was raised as a ground of appeal. Regulation 10 requires the tribunal, as a relevant authority, to determine any matter raised as a ground of appeal.

18. Mr De Mello submits that the concession made by the representative of the appellants before the First-tier Tribunal Judge was wrong. The appellants are family members of a relevant sponsor. This is because they are the nieces/nephews of the sponsor's husband who have been and

continue to be financially dependent on the sponsor/husband and who have been and continue to be a member of the sponsor/husband's household in Pakistan.

19. Concerning Article 8 of the ECHR, Mr De Mello submits that the First-tier Tribunal was required to "go on to decide the merits of the appeal, on invitation, in accordance with Article 7 and 24 of the Charter of the Fundamental Rights of the EU ("the EU Charter") and then if necessary go on to consider Article 8 ECHR and section 55" of the Borders, Citizenship and Immigration Act 2009 (best interests of child). In this regard, Mr De Mello seeks to invoke the CJEU's judgment in Dereci and Others v Bundesministerium für Inneres [2012] 1 CMLR 45; [2012] Imm AR 230 ("Dereci"). We understand Mr De Mello to place particular reliance on these paragraphs of the judgment:

> **"– The right to respect for private and family life**
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> 70. As a preliminary point, it must be observed that insofar as art.7 of the Charter of Fundamental Rights of the European Union ("the Charter"), concerning respect for private and family life, contains rights which correspond to rights guaranteed by art.8(1) of the ECHR, the meaning and scope of art.7 of the Charter are to be the same as those laid down by art.8(1) of the ECHR, as interpreted by the case law of the European Court of Human Rights (McB v E (C-400/10 PPU) [2011] I.L.Pr. 24 at [53]).
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> 71. However, it must be borne in mind that the provisions of the Charter are, according to art.51(1) thereof, addressed to the Member States only when they are implementing EU law. Under art.51(2), the Charter does not extend the field of application of EU law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (McB [2011] I.L.Pr. 24 at [51], see also Criminal proceedings against Gueye (C-483/09 & C-1/10) [2012] 1 C.M.L.R. 26 at [69]).
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> 72. Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by EU law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in art.7 of the Charter. On the other hand, if it takes the view that that situation is not covered by EU law, it must undertake that examination in the light of art.8(1) of the ECHR."

20. Alternatively, the appellants submit that their "underlying case was a human rights claim", the refusal of which was appealable: section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"); Baihinga (r.22; human rights appeal: requirements) [2018] UKUT 00090 (IAC); [2018] Imm AR 930.

21. The appellants argue that nothing in the 2002 Act or the 2020 Appeal Regulations precluded them from making a human rights claim or having it decided by the First-tier Tribunal under section 82(1)(b) of the 2002 Act. In any event, Article 8 of the ECHR can be raised as a ground of appeal at first instance, as it was relevant to the substance of the decision. It was not a "new matter". Even if it was such a matter, the presenting officer before the First-tier Tribunal Judge consented to Article 8 being considered.

22. In further written submissions of 11 May 2022, Mr De Mello and Mr Ahmed reiterate that the appellants fall within Article 10(3) of the Withdrawal Agreement, as they applied for facilitation of entry and residence before the end of the transition period (23:00 GMT, 31 December 2020) and their residence is being facilitated by the host State. The words "national legislation thereafter" in Article 10(3) do not simply refer to and end with the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"), as contended by the respondent. They refer to national legislation enacted by the United Kingdom in connection with its withdrawal from the EU. The European Union (Withdrawal Agreement) Act 2020 ("the 2020 WA Act") and the EUSS established under the immigration rules provide for the domestic implementation of the United Kingdom's obligations under the Withdrawal Agreement. Given that the appellants applied for entry clearance before 31 December 2020 and their application was decided after that date, they continue to be beneficiaries under Article 10 of the Withdrawal Agreement. In this regard, emphasis is placed on section 17 of the 2020 WA Act, which provides for "residence scheme immigration rules" to give effect to the Withdrawal Agreement. Furthermore, and in any event, the appellants had made a valid application which should have been treated by the respondent as an application under the 2016 Regulations.

23. As to Article 8, Mr De Mello and Mr Ahmed reiterate that where an individual has made an application which also consists of "an underlying Article 8 ECHR claim" and this has been considered by the respondent, then it is not a "new matter" and the First-tier Tribunal must therefore consider the merits of it, without requiring the consent of the Secretary of State.

24. In addition, the appellants reiterate their argument that the EU Charter applies to their appeals under the 2020 Appeal Regulations. Although section 5(4) of the European Union (Withdrawal) Act 2018 ("the 2018 Act") states that the Charter is not part of domestic law on or after "IP completion day" (31 December 2020), section 5(5) explains that this does not affect the retention in domestic law thereafter of any fundamental rights or principles which exist irrespective of the EU Charter.

25. The Withdrawal Agreement refers to the EU Charter in its recitals and in Articles 2, 4, 6, 7 and 9. Article 4 states that provisions of the Withdrawal Agreement which are based on EU law must be interpreted in the United Kingdom in conformity with the case law of the CJEU handed down before the end of the implementation period. As we understand them, this

means, according to Mr De Mello and Mr Ahmed, that, on the basis of Dereci, decisions involving other family members must be reached in a way that is compatible with the provisions of the Charter of Fundamental Rights, with the result that the First-tier Tribunal must address such issues in an appeal under the 2020 Appeal Regulations. No issue arises here as to the need for the Secretary of State to consent to a "new matter".

E. DISCUSSION

(1) The concession

26. The first matter to address is the status of the concession made by the appellants' representative to the First-tier Tribunal Judge, that the appeal decisions were "in accordance with the withdrawal agreement and the Immigration Rules" (paragraph 9 of the decision). Ms Smyth submits that the appellants have not addressed the relevant criteria, which need to be satisfied in order to persuade a court or tribunal that a concession may be withdrawn.

27. In AM (Iran) v SSHD [2018] EWCA Civ 2706, Simon LJ accepted that the Court of Appeal "may, depending on the circumstances, permit a concession that was made in a tribunal hearing to be withdrawn. There are no all-embracing principles that will apply beyond those implicit in CPR Part 1.1" (paragraph 40). CPR.1.1 concerns the overriding objective, whereby the court will "deal with cases justly and at proportionate cost".

28. At paragraph 44, Simon LJ noted that parties seeking to withdraw a concession may not be able to do so easily, in reliance on principles of justice and fairness, particularly where it is sought to do so in a belated and informal way. Nevertheless, at paragraph 45, he noted leading counsel for the respondent as accepting "that a concession could be withdrawn if this were in the overall interest of justice".

29. Since the scope of the Withdrawal Agreement and the EUSS is an issue that has wider ramifications than for merely the present appellants, and since that issue had been highlighted in the Upper Tribunal's case management of these appeals in a way that enabled the parties to address it in detail, we consider that it is, in the circumstances, appropriate to permit the appellants to withdraw the concession.

(2) Other family members

30. These appeals are concerned with "other family members", to use the expression found in Article 3(2) of the Directive. They are described as "extended family members" in the 2016 Regulations. In order to address the appellants' submissions, it is necessary to examine the legal position of this category of person.

31. Article 3(2) of the Directive requires other family members to be persons who do not fall within the definition of "family member" in Article 2. A "family member" means the spouse or partner of a Union citizen; direct descendants under the age of 21 or dependants (either of the Union citizen of the spouse/partner); and dependant direct relatives in the ascending line (and those of the spouse/partner) (which we emphasise would include the appellants' grandparents). There is, thus, a fundamental distinction between a "family member" and "any other family members" for the purposes of the Directive.

32. In order to fall within Article 3(2) the other family member must be a dependant or member of the household of the Union citizen in the country from which they have come; or there must be serious health grounds strictly requiring the personal care by the Union citizen. In addition, a person may be an other family member if they are the partner with whom the Union citizen has a durable relationship, duly attested.

33. A host Member State is required by Article 3(2) to "undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people".

34. Recital 6 to the Directive explains the background. In order to maintain the unity of the family in a broader sense, the situation of those who are not included in the definition of family members "and who therefore do not enjoy an automatic right of entry and residence in the host member state" is to be examined by that State "on the basis of its own national legislation" so as to decide whether entry and residence could be granted. In doing so, the host Member State will take into consideration the person's relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on that citizen.

35. As the respondent submits, the purpose of granting such rights is to protect the right to free movement of the Union citizen, rather than to protect family life.

36. Importantly, even if a person satisfies the requirements to be an other family member, Member States are under no obligation to accord that person a right of entry and residence. The obligation is merely to "facilitate" entry and residence.

37. In Rahman, the CJEU held at paragraph 21 that it is "apparent that Article 3(2) of Directive 2004/38 does not oblige the Member States to accord a right of entry and residence to persons who are family members, in the broad sense, dependent on a European citizen". The obligation to "facilitate" in Article 3(2) was an obligation on the Member State "to confer a certain advantage, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen".

38. At paragraph 22, the court explained this meant such persons should be able "to obtain a decision on their application that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons".

39. At paragraph 24, the court held that each Member State "has a wide discretion as regards to the selection of the factors to be taken into account" in deciding whether a person's entry and residence should be facilitated. Even though the wording of Article 3(2) "is not sufficiently precise to enable an applicant … to rely directly on that provision in order to invoke criteria which should in his view be applied when assessing his applications", the court concluded that the applicant was, at least, "entitled to a judicial review of whether the national legislation and its application have remained within the limits of the discretion set by that Directive." (paragraph 25).

40. Until 31 December 2020, the Directive was implemented in the United Kingdom by means of the 2016 Regulations. As mentioned, these Regulations described other family members as "extended family members". Provision was made in regulations 12(4) and (5) and 18(4) and (5) for the issue of EEA family permit and residence cards to extended family members.

41. An extended family member who had been issued with a residence card was, by reason of regulation 7(3) to be treated as a family member, for as long as they continue to satisfy the relevant condition in regulation 8 and provided the residence card remained in force. It is important to observe that regulation 7(3) of the 2016 Regulations did not affect the distinction drawn by the Directive between family members and other family members. On the contrary, it underscored the fact that, unlike the family members whose rights flow directly from their position as such, other family members have no such status, unless and until issued with the relevant permit, certificate or card. See SSHD v Aibangbee [2019] EWCA Civ 339; [2019] Imm AR 979; Macastena v SSHD [2018] EWCA Civ 1558; [2019] Imm AR 28.

42. Amongst the other Court of Appeal judgments on extended family members are Chowdhury v SSHD [2021] EWCA Civ 1220; [2021] Imm AR 1748 (a person will not qualify if there has been a break in their dependency since coming to the United Kingdom) and Soares v SSHD [2013] EWCA Civ 575; [2013] Imm AR 1096 (the dependency must be on an EU citizen, rather than a third country family member of such a citizen).

(3) Effect of the United Kingdom's withdrawal from the EU

43. It is now necessary to examine the position of other family members (or those claiming to be so) in the light of the United Kingdom's departure from the EU on 31 January 2020.

44. Section 1 of the 2018 Act repealed the European Communities Act 1972 on "exit day", which was defined by section 20 as 11pm on 31 January 2020. However, exit day was followed by an implementation period (also referred to as the transition period) which ended on "IP completion day", as defined in section 39 of the 2020 WA Act as 11pm on 31 December 2020. During the implementation period, the 1972 Act continued to have effect pursuant to section 1A of the 2018 Act, as amended by the 2020 WA Act.

45. EU free movement rights lost both their direct effect and their enforceability from 11pm on 31 December 2020. The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 ("the 2020 EU Withdrawal Act") revoked the 2016 Regulations and prevents them (along with relevant rights deriving from provisions of the Treaties to the extent that they are not implemented in domestic law) from continuing to have effect as retained the EU law, pursuant to sections 2 and 4 of the 2018 Act.

46. Relevant transitional provisions are contained in the Immigration and Social Security Coordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 ("the 2020 Consequential Regulations").

47. Paragraph 3 of Schedule 3 to the 2020 Consequential Regulations makes specific provision in respect of pending applications for documentation under the 2016 Regulations. In particular, paragraph 3(1) provides for regulation 12 of the 2016 Regulations to continue to apply to an application for an EEA family permit, "which was validly made in accordance with the EEA Regulations 2016 before commencement day" (11pm on 31 December 2020). Save as expressly preserved by the transitional provisions, the 2016 Regulations no longer apply because they have been revoked by the 2020 EU Withdrawal Act.

48. Crucially, therefore, since 1 January 2021, the Secretary of State has not been able to consider an application for an EEA family permit, except where a valid application was made before that date (or where paragraph 3(2) of Schedule 3 to the 2020 Consequential Regulations applies, which is not the position here).

49. In order to make a valid application, a person needed to have complied with regulation 21 of the 2016 Regulations. That required an application to be submitted online, by post or in person, using a specified application form. It is common ground that the appellants did not make a valid application for an EEA family permit in accordance with regulation 21, before the end of the transition period even though they could have done so.

(4) The Withdrawal Agreement

50. The Withdrawal Agreement was signed on 19 October 2019. Article 126 contains a transition period. That period started on the day of entry and

to force of the Agreement and ended on 23:00 hours GMT on 31 December 2020. During that period, EU law continued to apply in the United Kingdom.

51. Article 4 of the Withdrawal Agreement provides for individuals to be able to rely directly on provisions of the Agreement which meet the conditions for a direct effect under EU law. Pursuant to Article 4, the Withdrawal Agreement is given such direct effect in the United Kingdom by section 7A of the 2018 Act.

52. Part 2 of the Withdrawal Agreement makes provision in relation to citizens' rights. Both Articles 10 and 18 are contained within Part 2.

53. As is apparent from Article 18.1 and 18.4, the Withdrawal Agreement allows a host State to introduce "constitutive residence schemes", which means that EU citizens and their direct family members can now be required to apply for residence rights, as opposed to enjoying them by virtue of their status and activities in the host Member State.

54. As we have seen, however, other family members never enjoyed automatic residence rights under EU law. Not only did an individual have to satisfy the definition of other family member (extended family member under the 2016 Regulations); they also had to be the beneficiary of a positive exercise of discretion, recognised by the grant of residence documentation (albeit that such discretion was not unfettered: see Rahman).

55. Article 18.1 explains who, in the case of a constitutive residence scheme, is entitled to apply for a new residence status, which confers the rights under Title II of Part 2. Title II includes Articles 10 and 18. The persons concerned are "Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title".

56. Article 10 tells us who these persons are. Article 10.1(e) and (f) refer to "family members". The expression "family members" is defined in Article 9. The definition does not encompass "other family members" within the meaning of Article 3(2) of the 2004 Directive. Such persons are brought within the application of Part 2 of the Withdrawal Agreement by Article 10.2:

> "2. Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter."

57. As explained in Article 10.3, Article 10.2 also applies to persons falling under points (a) and (b) of Article 3(2) of the Directive, provided they

"have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter".

58. The reference to "national legislation" reflects the fact that the arrangements for other family members are primarily regulated by domestic law: see Rahman.

(5) EUSS

59. We turn to the EUSS. This is the United Kingdom's Residence Scheme, pursuant to Article 18 of the Withdrawal Agreement. The EUSS was introduced on 30 March 2019. It enables EU, other EEA and Swiss citizens resident in the United Kingdom by the end of the transition period, and their family members, to obtain the necessary immigration status in order to reside lawfully in the United Kingdom, following this country's exit from the EU.

60. Appendix EU (FP) applies to persons residing outside the United Kingdom. It contains the conditions for the grant of either (a) an EUSS family permit to join a relevant EEA citizen or a qualifying British citizen in the United Kingdom or to accompany them to the United Kingdom; or (b) an EUSS Travel Permit. FP6(1) and (2) contain the eligibility requirements for entry clearance to be granted in the form of an EUSS family permit. FP6(1) is the relevant provision in the case of the appellants. It requires them to be "family members of a relevant EEA citizen", as defined in Annex 1. In short, a "family member of a relevant EEA citizen" must be a spouse, civil partner or durable partner of a relevant EEA citizen; or be the child or dependant parent of such a citizen, or of that citizen's spouse or civil partner.

(6) The appellants' applications to the respondent

61. From the formal introduction of the EUSS on 30 March 2019 until 31 December 2020, EEA citizens and their family members could apply either under the 2016 Regulations or under the EUSS.

62. There was publicly available guidance on www.gov.uk website as follows:

> "**EU Settlement Scheme family permit until 31 December 2020**
>
> Apply for the EU settlement scheme family permit if you're the close family member of:
>
> - An EU, EEA or Swiss citizen and I have 'settled' or 'pre-settled' status under the EU Settlement Scheme
> - An Irish citizen (they don't need to apply to the EU Settlement Scheme, but must meet the eligibility criteria)

- An eligible person of Northern Ireland (they must also meet the criteria for the EU settlement scheme, even though they cannot apply)
- An eligible British citizen who also has EU, EEA or Swiss citizenship, and who lived in the UK as an EU, EEA or Swiss citizen before getting British citizenship

You must be a 'close' family member, such as a spouse, civil partner, dependent child or dependent parent.

(from 1 January 2021 EU, EEA or Swiss family members of an EU, EEA or Swiss citizen who was resident in the UK before 1 January 2021 will also be able to apply for the EU Settlement Scheme family permit).

EU family permit until 31 December 2020

Apply for the EEA family permit if you're the family member of an EU, EEA or Swiss citizen.

You can be a close or 'extended' family member – for example a brother, sister, aunt, uncle, cousin, nephew, niece or unmarried partner.

Extended family members must apply before 11pm on 31 December 2020. After this, only close family members and unmarried partners will be able to apply.

Check if you're eligible and apply for the EEA family permit.

There are other ways you may be eligible for an EEA family permit, for example:

- with a 'derivative right of residence' – you're the primary carer of a British, EU, EEA or Swiss child or British adult dependent, the primary carer's child, or the child of an EU, EEA or Swiss citizen who previously worked in the UK
- if you can make a 'Surinder Singh' application after living in an EEA country or Switzerland with a British family member
- with a 'retained right of residence' – you have the right to stay in the UK as the family member of an EU, EEA or Swiss citizen who has died, left the UK or is no longer your spouse or civil partner

…"

63. As is evident from the website, persons were told in plain terms that family members could apply as such for a family permit or under the EUSS. However, in order to apply under the EUSS, they must be a "close" family member. That was expressly contrasted with the "extended" family member, who could apply for an EEA family permit until 31 December 2020, but not under EUSS.

64. As we have seen from Article 10 of the Withdrawal Agreement, in order to fall within the scope of Part 2 (and, thus, Article 18) a person asserting to be an other family member must have "applied for facilitation of entry and residence before the end of the transition period".

65. Although we have permitted the appellants to withdraw the concession made on their behalf in the First-tier Tribunal, it is plain from the above analysis that, notwithstanding the submissions now made on their behalf, the appellants simply do not fall within the terms of Appendix EU (FP). Those immigration rules give effect to the Withdrawal Agreement and the appellants are not family members within the scope of Article 18.1 of the Withdrawal Agreement.

66. Faced with this difficulty, the appellants contend that the application they made on 3 February 2020 under Appendix EU (FP) was an application "for facilitation of entry and residence" for the purposes of Article 10.3 of the Withdrawal Agreement. It is, however, plain that Article 10.3 encompasses those who apply for entry or residence as other family members. The expression "facilitation" in the context of the preceding phrase "persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC" puts that beyond doubt. The appellants' applications were not made on the basis that the Secretary of State should exercise discretion in their favour, as part of her obligations as identified by the CJEU in Rahman. The application material makes it crystal clear what the basis of the applications was. The appellants applied on the basis that they were family members.

67. If the appellants had applied under the 2016 Regulations as extended family members, then the effect of the transitional provisions would have been such as to require the respondent to reach a decision, even after 31 December 2020, on whether their residence should be "facilitated". In the event of a negative decision, a right of appeal would have lain to the First-tier Tribunal. As a result of a concession by the Secretary of State, now contained in immigration rules, a decision in the appellants' favour would have led to the grant of leave, rather than the provision of EU (EEA) residence documentation (which is no longer available).

68. To that very limited extent, we agree with Mr De Mello and Mr Ahmed that the words "its national legislation thereafter" in Article 10.3 do not need to be confined to the 2016 Regulations. However, this does not assist the appellants because, to reiterate, they did not apply for facilitation of entry and residence.

69. In the alternative, the appellants contend that, notwithstanding they applied under EUSS rather than under the 2016 Regulations, the respondent ought to have treated their applications as being made under those Regulations.

70. Mr De Mello seeks to draw support from Article 18.1(e) of the Withdrawal Agreement, whereby the host State "shall ensure that any administrative procedures for applications are smooth, transparent and simple, and that any unnecessary administrative burdens are avoided". Mr De Mello also relies upon Article 18.1(f), which requires application forms to be "short, simple, user-friendly and adapted to the context of this Agreement".

71. The guidance on www.gov.uk, however, shows that the Secretary of State has been at pains to provide potential applicants with the relevant information, in a simple form, including highlighting the crucial distinction between “close family members” and “extended family members”. That is a distinction which, as we have seen from the Directive and the case law, is enshrined in EU law. It is not a novel consequence of the United Kingdom’s leaving the EU. It is, accordingly, not possible to invoke sub-paragraphs (e) and (f) of Article 18 as authority for the proposition that the respondent should have treated one kind of application as an entirely different kind of application.

72. Mr De Mello also invoked Article 18.1(r). This requires redress procedures to ensure that the decision refusing to grant the residence status “is not disproportionate”. It cannot, however, be disproportionate for the respondent and the Secretary of State, faced with the scale of EUSS applications, to devise and operate a system which draws attention to the two fundamentally different ways in which a family application should be made, and which then determines applications by reference to what an applicant is specifically asking to be given.

73. The upshot is that the appellants cannot show their rights under the Withdrawal Agreement were breached by the respondent’s decisions. The appellants cannot show that those decisions were not in accordance with Appendix EU (FP). Accordingly, the First-tier Tribunal could not allow their appeals by reference to regulation 8 of the 2020 Appeal Regulations.

(7) Article 8 ECHR/Charter of Fundamental Rights/ duty in respect of children

74. At the beginning of paragraph 21 of his decision, the First-tier Tribunal Judge addressed Article 8 of the ECHR. Having done so, he concluded that the respondent’s decisions were compatible with Article 8.

75. The Upper Tribunal is grateful for the further written submissions which it invited on this issue.

76. The first task is to decide whether the First-tier Tribunal has jurisdiction in an appeal governed by the 2020 Appeal Regulations to consider a “human rights” ground. This involves an analysis of regulation 9. Under regulation 9, the First-tier Tribunal must consider any matter that is raised in a statement made under section 120 of the 2002 Act, which constitutes a “specified ground of appeal”; that is to say, a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act.

77. The grounds contained in section 84 concern refusal of a protection claim, the refusal of a human rights claim and the revocation of protection status. The only permissible ground in respect of the refusal of the human rights claim is that the decision is unlawful under section 6 of the Human Rights Act 1998.

78. It is, therefore, possible for an appellant to raise a human rights ground, in particular Article 8 of the ECHR, in a section 120 notice, which must then be considered by the First-tier Tribunal pursuant to its duty under regulation 9(1) and determined under regulation 10.

79. Regulation 9(4) provides that the first-tier Tribunal has power to consider any matter which it thinks relevant to the substance of the decision. Here, however, the First-tier Tribunal can do so only with the consent of the Secretary of State, if the matter is a "new matter" as defined in regulation 9(6). This provides that the matter will be a "new matter" if it constitutes a ground of appeal of a kind listed in regulation 8 or section 84 and the Secretary of State has not previously considered the matter in the context of the decision appealed against under the Regulations or in the context of a section 120 statement from the appellant.

80. The "jurisdiction" issue under regulation 9(4) in the context of Article 8 ECHR was addressed by the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 220 (IAC). In essence, the Upper Tribunal found that the First-tier Tribunal has jurisdiction under regulation 9(4) to consider a human rights ground on an appeal against refusal of an application under the EUSS, provided that, if it is a "new matter", the Secretary of State consents. Unless the Secretary of State has previously considered the Article 8 ECHR issue in the context of the decision appealed against or in a section 120 statement, we agree with Ms Smyth that the Secretary of State's consent will be necessary in order for the First-tier Tribunal to consider the Article 8 issue. In order to succeed in an application for entry clearance under Appendix EU(FP), an applicant must meet the specific requirements of those rules. Since neither Appendix EU nor Appendix EU(FP) is intended to, and does not, give effect to this country's obligations under Article 8 ECHR, consideration of Article 8 forms no part of the decision-making process in relation to such an application. Regardless of the strength of any Article 8 claim, leave could not be granted under those provisions unless the requirements of the relevant rules were satisfied.

81. This is amply demonstrated in the context of the present appeals by the application materials, to which we have made reference. These do not refer to human rights matters. They are, in no sense, a human rights claim within the meaning of section 113(1) of the 2002 Act. The decisions refusing the appellants' applications make no reference to human rights. The decisions can in no way be regarded as refusals of human rights claims within the meaning of section 82(1)(b) of that Act.

82. The appellants contend that the First-tier Tribunal Judge had a duty to consider their human rights and that this was not capable of being a "new matter" requiring the Secretary of State's consent.

83. Mr De Mello submits that, where an appellant has made an application for residence pursuant to Article 18 of the Withdrawal Agreement, and the application contains a human rights claim which is refused, then the

appellant may appeal on human rights grounds/grounds based on the EU Charter; and that this matter must be considered by the First-tier Tribunal.

84. The first point to make in considering this submission is that, as we have said, no such human rights claim was made in the present case. If the appellants' applications and the respondent's decisions in the present case are (as we suspect) typical, then the First-tier Tribunal is unlikely to see cases involving Mr De Mello's factual matrix.

85. The appellants, however, advance a broader proposition. They contend that, if they do not satisfy the EUSS, then the First-tier Tribunal in an appeal under the 2020 Appeal Regulations "must go on to decide the merits of the appeal, on invitation, in accordance with Articles 7 and 24 of the Charter of Fundamental Rights of the EU and then if necessary go on to consider Article 8 ECHR and section 55". If the view is taken that the situation is not covered by European Union law, then the First-tier Tribunal "must undertake that examination in the light of Article 8(1) of the ECHR".

86. We find that the EU Charter has no bearing on these appeals. The EU Charter ceased to be part of the United Kingdom's law on 31 December 2020: section 5(4) of the 2018 Act. The "saving" in section 5(5) merely concerns fundamental rights or principles which exist irrespective of the EU Charter. Since Article 7 of the EU Charter corresponds to Article 8 ECHR, the effect of section 5(5) is to put beyond doubt that Article 8 ECHR continues to apply after 31 December 2020.

87. Article 24 of the EU Charter concerns the rights of the child. Article 24.1 is irrelevant in the present context. Article 24.2, which requires a child's best interests to be a primary consideration in all actions relating to children, broadly corresponds with section 55 of the Borders, Citizenship and Immigration Act 2009, insofar as the respondent is concerned. The appellants have, however, failed to explain how the respondent's decisions under EUSS (FP) could conceivably have been different, merely because the appellants were children; still less how section 55 can be a material factor in an appeal brought under the 2020 Appeal Regulations (leaving aside the issue of human rights, discussed above).

88. In their further written submissions, Mr De Mello and Mr Ahmed submit that the EU Charter features in the recitals to the Withdrawal Agreement and in Article 2(a)(i) (the definition of "Union law"). The expression "Union law" is then referred to in articles 4, 6, 7 and 9. Since we are concerned with Part 2 (citizens' rights) of the Withdrawal Agreement, it is only the reference in Article 9(c) to Union law that is potentially of relevance. Article 9(c) defines the "host State", in respect of Union citizens and their family members, as meaning the United Kingdom, if the citizens/members exercised their rights of residence in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside in this country thereafter.

89. That, however, provides no basis at all upon which to argue, as the appellants appear to do, that the EU Charter has a direct bearing on Articles 10/18, to the point where a First-tier Tribunal Judge is compelled to engage with the Charter in an appeal under the 2020 Appeal Regulations, irrespective of the restrictions on grounds and matters contained in regulations 8 and 9.

90. This leaves the submission that retained EU law is such as to require the respondent and the First-tier Tribunal to determine the Article 8 rights of the appellants in the context of an appeal under the 2020 Appeal Regulations. Mr De Mello and Mr Ahmed rely, in this regard, on Dereci. At paragraph 72, the CJEU held:

> "72. … in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by EU law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in art.7 of the Charter. On the other hand, if it takes the view that that situation is not covered by EU law, it must undertake that examination in the light of art.8(1) of the ECHR."

91. We are in no doubt that Dereci does not have the effect for which the appellants contend, even if it somehow remains part of United Kingdom law for the purposes with which we are concerned. If the position were otherwise, Schedule 2 (appeals to the First-tier Tribunal) to the 2016 Regulations would have been framed so as to include, as a ground of appeal, that the decision under those Regulations was a violation of Article 8 of the ECHR. In fact, the judgment of the Court of Appeal in Amirteymour v SSHD [2017] EWCA Civ 353; [2017] Imm AR 1368 makes the appellants' case untenable. There, the Court held that human rights could not constitute a ground of appeal under the 2006 Regulations (the predecessors of the 2016 Regulations), unless it had featured in a response to a section 120 notice (the "new matter" provisions not having come into being at that time).

92. The position, therefore, is that, unless there has been a section 120 response raising human rights, the First-tier Tribunal may entertain a submission that leave should be granted in order to avoid a breach of section 6 of the Human Rights Act 1998, only with the consent of the Secretary of State if this would involve consideration of a "new matter".

93. Since the respondent's decision making under Appendix EU (F P) is not concerned with human rights issues, the raising of a human rights claim will always be a "new matter" unless, for some reason, the Secretary of State has already considered it.

94. The scenario described in paragraph 92 above is precisely what happened at the hearing on 7 June 2021 of the appellants' appeals. For the reasons he gave, the First-tier Tribunal Judge was entitled to conclude, on the evidence, that the decisions refusing entry clearance were "entirely

compatible with respect for their family and private life to which the appellants are entitled by Article 8 of the ECHR".

F. DECISION

95. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. The appellants' appeals are accordingly dismissed.

Mr Justice Lane

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber

ANNEX
LEGAL FRAMEWORK

“WITHDRAWAL AGREEMENT”

Agreement on the withdrawal of the United Kingdom and Great Britain and Northern Ireland from the European Union and the European Autonomic Energy Community

“Preamble …

RECALLING that, pursuant to Article 50 TEU, in conjunction with Article 106a of the Euratom Treaty, and subject to the arrangements laid down in this Agreement, the law of the Union and of Euratom in its entirety ceases to apply to the United Kingdom from the date of entry into force of this Agreement,

STRESSING that the objective of this Agreement is to ensure an orderly withdrawal of the United Kingdom from the Union and Euratom,

RECOGNISING that it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this Agreement, and to ensure that their rights under this Agreement are enforceable and based on the principle of non-discrimination; recognising also that rights deriving from periods of social security insurance should be protected,

…

UNDERLINING that this Agreement is founded on an overall balance of benefits, rights and obligations for the Union and the United Kingdom,

…

PART ONE

COMMON PROVISIONS

ARTICLE 1

Objective

This Agreement sets out the arrangements for the withdrawal of the United Kingdom of Great Britain and Northern Ireland ("United Kingdom") from the European Union ("Union") and from the European Atomic Energy Community ("Euratom").

ARTICLE 2

Definitions

For the purposes of this Agreement, the following definitions shall apply:

(a) "Union law" means:

(i) the Treaty on European Union ("TEU"), the Treaty on the Functioning of the European Union ("TFEU") and the Treaty establishing the European Atomic Energy Community ("Euratom Treaty"), as amended or supplemented, as well as the Treaties of Accession and the Charter of Fundamental Rights of the European Union, together referred to as "the Treaties";

(ii) the general principles of the Union's law;

(iii) the acts adopted by the institutions, bodies, offices or agencies of the Union;

(iv) the international agreements to which the Union is party and the international agreements concluded by the Member States acting on behalf of the Union;

(v) the agreements between Member States entered into in their capacity as Member States of the Union;

(vi) acts of the Representatives of the Governments of the Member States meeting within the European Council or the Council of the European Union ("Council");

(vii) the declarations made in the context of intergovernmental conferences which adopted the Treaties;

…

ARTICLE 4

Methods and principles relating to the effect, the implementation and the application of this Agreement

1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.

Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.

…

3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.

ARTICLE 6

References to Union law 1

1. With the exception of Parts Four and Five, unless otherwise provided in this Agreement all references in this Agreement to Union law shall be understood as references to Union law, including as amended or replaced, as applicable on the last day of the transition period.

2. Where in this Agreement reference is made to Union acts or provisions thereof, such reference shall, where relevant, be understood to include a reference to Union law or provisions thereof that, although replaced or superseded by the act referred to, continue to apply in accordance with that act.

3. For the purposes of this Agreement, references to provisions of Union law made applicable by this Agreement shall be understood to include references to the relevant Union acts supplementing or implementing those provisions.

ARTICLE 7

References to the Union and to Member States 1

1. For the purposes of this Agreement, all references to Member States and competent authorities of Member States in provisions of Union law made applicable by this Agreement shall be understood as including the United Kingdom and its competent authorities, except as regards:

(a) the nomination, appointment or election of members of the institutions, bodies, offices and agencies of the Union, as well as the participation in the decision-making and the attendance in the meetings of the institutions;

(b) the participation in the decision-making and governance of the bodies, offices and agencies of the Union;

(c) the attendance in the meetings of the committees referred to in Article 3(2) of Regulation (EU) No 182/2011 of the European Parliament and of the Council, of Commission expert groups or of other similar entities, or in the meetings of expert groups or similar entities of bodies, offices and agencies of the Union, unless otherwise provided in this Agreement.

2. Unless otherwise provided in this Agreement, any reference to the Union shall be understood as including Euratom.

PART TWO

CITIZENS' RIGHTS

TITLE I

GENERAL PROVISIONS

ARTICLE 9

Definitions

For the purposes of this Part, and without prejudice to Title III, the following definitions shall apply:

(a) "family members" means the following persons, irrespective of their nationality, who fall within the personal scope provided for in Article 10 of this Agreement:

(i) family members of Union citizens or family members of United Kingdom nationals as defined in point (2) of Article 2 of Directive 2004/38/EC of the European Parliament and of the Council;

(ii) persons other than those defined in Article 3(2) of Directive 2004/38/EC whose presence is required by Union citizens or United Kingdom nationals in order not to deprive those Union citizens or United Kingdom nationals of a right of residence granted by this Part;

…

ARTICLE 10

Personal scope

1. Without prejudice to Title III, this Part shall apply to the following persons:

(a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter;

(b) United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter;

(c) Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter;

(d) United Kingdom nationals who exercised their right as frontier workers in one or more Member States in accordance with Union

law before the end of the transition period and continue to do so thereafter;

(e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:

(i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter;

(ii) they were directly related to a person referred to in points (a) to (d) and resided outside the host State before the end of the transition period, provided that they fulfil the conditions set out in point (2) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph;

(iii) they were born to, or legally adopted by, persons referred to in points (a) to (d) after the end of the transition period, whether inside or outside the host State, and fulfil the conditions set out in point (2)(c) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph and fulfil one of the following conditions:

– both parents are persons referred to in points (a) to (d);

– one parent is a person referred to in points (a) to (d) and the other is a national of the host State; or

– one parent is a person referred to in points (a) to (d) and has sole or joint rights of custody of the child, in accordance with the applicable rules of family law of a Member State or of the United Kingdom, including applicable rules of private international law under which rights of custody established under the law of a third State are recognised in the Member State or in the United Kingdom, in particular as regards the best interests of the child, and without prejudice to the normal operation of such applicable rules of private international law;

(f) family members who resided in the host State in accordance with Articles 12 and 13, Article 16(2) and Articles 17 and 18 of Directive 2004/38/EC before the end of the transition period and continue to reside there thereafter.

2. Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.

3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter.

4. Without prejudice to any right to residence which the persons concerned may have in their own right, the host State shall, in accordance with its national legislation and in accordance with point (b) of Article 3(2) of Directive 2004/38/EC, facilitate entry and residence for the partner with whom the person referred to in points (a) to (d) of paragraph 1 of this Article has a durable relationship, duly attested, where that partner resided outside the host State before the end of the transition period, provided that the relationship was durable before the end of the transition period and continues at the time the partner seeks residence under this Part.

5. In the cases referred to in paragraphs 3 and 4, the host State shall undertake an extensive examination of the personal circumstances of the persons concerned and shall justify any denial of entry or residence to such persons.

...

ARTICLE 18

Issuance of residence documents

1. The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form.

   Applying for such a residence status shall be subject to the following conditions:

   (a) the purpose of the application procedure shall be to verify whether the applicant is entitled to the residence rights set out in this Title. Where that is the case, the applicant shall have a right to be granted the residence status and the document evidencing that status;

   (b) the deadline for submitting the application shall not be less than 6 months from the end of the transition period, for persons residing in the host State before the end of the transition period.

   For persons who have the right to commence residence after the end of the transition period in the host State in accordance with this Title, the deadline for submitting the application shall be 3 months after their arrival or the expiry of the deadline referred to in the first subparagraph, whichever is later.

A certificate of application for the residence status shall be issued immediately;

(c) the deadline for submitting the application referred to in point (b) shall be extended automatically by 1 year where the Union has notified the United Kingdom, or the United Kingdom has notified the Union, that technical problems prevent the host State either from registering the application or from issuing the certificate of application referred to in point (b). The host State shall publish that notification and shall provide appropriate public information for the persons concerned in good time;

(d) where the deadline for submitting the application referred to in point (b) is not respected by the persons concerned, the competent authorities shall assess all the circumstances and reasons for not respecting the deadline and shall allow those persons to submit an application within a reasonable further period of time if there are reasonable grounds for the failure to respect the deadline;

(e) the host State shall ensure that any administrative procedures for applications are smooth, transparent and simple, and that any unnecessary administrative burdens are avoided;

(f) application forms shall be short, simple, user friendly and adapted to the context of this Agreement; applications made by families at the same time shall be considered together;

…

(l) the host State may only require family members who fall under point (e)(i) of Article 10(1) or Article 10(2) or (3) of this Agreement and who reside in the host State in accordance with point (d) of Article 7(1) or Article 7(2) of Directive 2004/38/EC to present, in addition to the identity documents referred to in point (i) of this paragraph, the following supporting documents as referred to in Article 8(5) or 10(2) of Directive 2004/38/EC:

(i) a document attesting to the existence of a family relationship or registered partnership;

…

(n) for cases other than those set out in points (k), (l) and (m), the host State shall not require applicants to present supporting documents that go beyond what is strictly necessary and proportionate to provide evidence that the conditions relating to the right of residence under this Title have been fulfilled;

(o) the competent authorities of the host State shall help the applicants to prove their eligibility and to avoid any errors or omissions in their applications; they shall give the applicants the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions;

(p) criminality and security checks may be carried out systematically on applicants, with the exclusive aim of verifying whether the restrictions set out in Article 20 of this Agreement may be applicable. For that purpose, applicants may be required to declare past criminal convictions which appear in their criminal record in accordance with the law of the State of conviction at the time of the application. The host State may, if it considers this essential, apply the procedure set out in Article 27(3) of Directive 2004/38/EC with respect to enquiries to other States regarding previous criminal records;

…

(r) the applicant shall have access to judicial and, where appropriate, administrative redress procedures in the host State against any decision refusing to grant the residence status. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed decision is based. Such redress procedures shall ensure that the decision is not disproportionate.

…

3. Pending a final decision by the competent authorities on any application referred to in paragraph 1, and pending a final judgment handed down in case of judicial redress sought against any rejection of such application by the competent administrative authorities, all rights provided for in this Part shall be deemed to apply to the applicant, including Article 21 on safeguards and right of appeal, subject to the conditions set out in Article 20(4).

4. Where a host State has chosen not to require Union citizens or United Kingdom nationals, their family members, and other persons, residing in its territory in accordance with the conditions set out in this Title, to apply for the new residence status referred to in paragraph 1 as a condition for legal residence, those eligible for residence rights under this Title shall have the right to receive, in accordance with the conditions set out in Directive 2004/38/EC, a residence document, which may be in a digital form, that includes a statement that it has been issued in accordance with this Agreement.

Article 21

Safeguards and right of appeal

The safeguards set out in Article 15 and Chapter VI of Directive 2004/38/EC shall apply in respect of any decision by the host State that restricts residence rights of the persons referred to in Article 10 of this Agreement.

…

"THE DIRECTIVE"

DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 29 April 2004

on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

GENERAL PROVISIONS

Article 1

Subject

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

Article 2

Definitions

2) "Family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

Article 3

Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

   (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

   (b) the partner with whom the Union citizen has a durable relationship, duly attested.

   The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

…

“THE 2018 ACT”

EUROPEAN UNION (WITHDRAWAL) ACT 2018

s. 1 Repeal of the European Communities Act 1972

The European Communities Act 1972 is repealed on exit day.

s. 1A Saving for ECA for implementation period

(5) Subsections (1) to (4) are repealed on IP completion day.

(6) In this Act—

“the implementation period” means the transition or implementation period provided for by Part 4 of the withdrawal agreement and beginning with exit day and ending on IP completion day;

“IP completion day” (and related expressions) have the same meaning as in the European Union (Withdrawal Agreement) Act 2020 (see section 39(1) to (5) of that Act);

“withdrawal agreement” has the same meaning as in that Act (see section 39(1) and (6) of that Act).

(7) In this Act—

(a) references to the European Communities Act 1972 are to be read, so far as the context permits or requires, as being or (as the case may be) including references to that Act as it continues to have effect by virtue of subsections (2) to (4) above, and

(b) references to any Part of the withdrawal agreement or the EEA EFTA separation agreement include references to any other provisions of that agreement so far as applying to that Part.

s. 2 Saving for EU-derived domestic legislation

(1) EU-derived domestic legislation, as it has effect in domestic law immediately before [IP completion day], continues to have effect in domestic law on and after [IP completion day].

(3) This section is subject to section 5 and Schedule 1 (exceptions to savings and incorporation) [and section 5A (savings and incorporation: supplementary)].

…

s. 4 Saving for rights etc. under section 2(1) of the ECA

(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before [IP completion day]—

(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and

(b) are enforced, allowed and followed accordingly,

continue on and after [IP completion day] to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).

(2) Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they—

(a) form part of domestic law by virtue of section 3,

(aa) are, or are to be, recognised and available in domestic law (and enforced, allowed and followed accordingly) by virtue of section 7A or 7B,] or

(b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before [IP completion day] (whether or not as an essential part of the decision in the case).

(3) This section is subject to section 5 and Schedule 1 (exceptions to savings and incorporation) [and section 5A (savings and incorporation: supplementary)].

s. 5 Exceptions to savings and incorporation

…

(4) The Charter of Fundamental Rights is not part of domestic law on or after [IP completion day]

(5) Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).

…

s. 7A General implementation of remainder of Withdrawal Agreement

(1) Subsection (2) applies to—

(a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal Agreement, and

(b) all such remedies and procedures from time to time provided for by or under the withdrawal Agreement, as in accordance with the

withdrawal Agreement are without further enactment to be given legal effect or used in the United Kingdom.

(2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—

(a) recognised and available in domestic law, and
(b) enforced, allowed and followed accordingly.

(3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2).

…

Schedule 1 (further provision about exceptions to savings and incorporation)

3

(1) There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law.

(2) No court or tribunal or other public authority may, on or after exit day—

(a) disapply or quash any enactment or other rule of law, or
(b) quash any conduct or otherwise decide that it is unlawful,

because it is incompatible with any of the general principles of EU law.

…

5

(1) References in section 5 and this Schedule to the principle of the supremacy of EU law, the Charter of Fundamental Rights, any general principle of EU law or the rule in *Francovich* are to be read as references to that principle, Charter or rule so far as it would otherwise continue to be, or form part of, domestic law on or after exit day in accordance with this Act.

(2) Accordingly (among other things) the references to the principle of the supremacy of EU law in section 5(2) and (3) do not include anything which would bring into domestic law any modification of EU law which is adopted or notified, comes into force or only applies on or after exit day.

“THE 2020 WA ACT”

EUROPEAN UNION (WITHDRAWAL AGREEMENT) ACT 2020

17 Interpretation: Part 3

(1) In this Part, “*residence scheme immigration rules*” means—

(a) Appendix EU to the immigration rules except those rules, or changes to that Appendix, which are identified in the immigration rules as not having effect in connection with the residence scheme that operates in connection with the withdrawal of the United Kingdom from the EU, and

(b) any other immigration rules which are identified in the immigration rules as having effect in connection with the withdrawal of the United Kingdom from the EU.

(2) In this Part, “*relevant entry clearance immigration rules*” means any immigration rules which are identified in the immigration rules as having effect in connection with the granting of entry clearance for the purposes of acquiring leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules.

(3) In this Part, references to having leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules include references to having such leave granted by virtue of those rules before this section comes into force.

(4) In this Part, a reference to a Chapter, Title, Part or other provision of the withdrawal agreement, EEA EFTA separation agreement or Swiss citizens’ rights agreement includes a reference to—

(a) any other provision of the agreement in question so far as relating to that Chapter, Title, Part or other provision, and
(b) any provision of EU law which is applied by, or referred to in, that Chapter, Title, Part or other provision (to the extent of the application or reference).

(5) In this Part—

“*entry clearance*” has the meaning given by section 33(1) of the Immigration Act 1971 (interpretation);

“*immigration rules*” has the same meaning as in the Immigration Act 1971.

39 Interpretation

(1) In this Act—

“devolved authority” means—

(a) the Scottish Ministers,
(b) the Welsh Ministers, or
(c) a Northern Ireland department;

"EEA EFTA separation agreement" means (as modified from time to time in accordance with any provision of it) the Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union;

"enactment" means an enactment whenever passed or made and includes—

(a) an enactment contained in any Order in Council, order, rules, regulations, scheme, warrant, byelaw or other instrument made under an Act of Parliament,

(b) an enactment contained in any Order in Council made in exercise of Her Majesty's Prerogative,

(c) an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament,

(d) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales,

(e) an enactment contained in, or in an instrument made under, Northern Ireland legislation,

(f) an enactment contained in any instrument made by a member of the Scottish Government, the Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Government, a Northern Ireland Minister, the First Minister in Northern Ireland, the deputy First Minister in Northern Ireland or a Northern Ireland department in exercise of prerogative or other executive functions of Her Majesty which are exercisable by such a person on behalf of Her Majesty,

(g) an enactment contained in, or in an instrument made under, a Measure of the Church Assembly or of the General Synod of the Church of England, and

(h) any retained direct EU legislation;

"IP completion day" means 31 December 2020 at 11.00 p.m (and see subsections (2) to (5));

"Minister of the Crown" has the same meaning as in the Ministers of the Crown Act 1975 and also includes the Commissioners for Her Majesty's Revenue and Customs;

"modify" includes amend, repeal or revoke (and related expressions are to be read accordingly);

"primary legislation" means—

(a) an Act of Parliament,

(b) an Act of the Scottish Parliament,

(c) a Measure or Act of the National Assembly for Wales, or

(d) Northern Ireland legislation;

"subordinate legislation" means any Order in Council, order, rules, regulations, scheme, warrant, byelaw or other instrument made under any primary legislation;

"Swiss citizens' rights agreement" means (as modified from time to time in accordance with any provision of it) the Agreement signed at Bern on 25 February 2019 between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation on citizens' rights following the withdrawal of the United Kingdom from—

(a) the European Union, and

(b) the free movement of persons agreement,

so far as the Agreement operates for the purposes of the case where "specified date" for the purposes of that Agreement has the meaning given in Article 2(b)(ii) of that Agreement;

"withdrawal agreement" means the agreement between the United Kingdom and the EU under Article 50(2) of the Treaty on European Union which sets out the arrangements for the United Kingdom's withdrawal from the EU (as that agreement is modified from time to time in accordance with any provision of it).

(2) In this Act references to before, after or on IP completion day, or to beginning with IP completion day, are to be read as references to before, after or at 11.00 p.m. on 31 December 2020 or (as the case may be) to beginning with 11.00 p.m. on that day.

(3) Subsection (4) applies if, by virtue of any change to EU summer-time arrangements, the transition or implementation period provided for by Part 4 of the withdrawal agreement is to end on a day or time which is different from that specified in the definition of “IP completion day” in subsection (1).

(4) A Minister of the Crown may by regulations—

(a) amend the definition of “IP completion day” in subsection to ensure that the day and time specified in the definition are the day and time that the transition or implementation period provided for by Part 4 of the withdrawal agreement is to end, and

(b) amend subsection (2) in consequence of any such amendment.

(5) In subsection (3) “EU summer-time arrangements” means the arrangements provided for by Directive 2000/84/EC of the European Parliament and of the Council of 19 January 2001 on summer-time arrangements.

(6) In this Act any reference to an Article of the Treaty on European Union includes a reference to that Article as applied by Article 106a of the Euratom Treaty.

“THE 2020 EU WITHDRAWAL ACT”

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) ACT 2020

s. 1 Repeal of the main retained EU law relating to free movement etc.

Schedule 1 makes provision to—

(a) end rights to free movement of persons under retained EU law, including by repealing the main provisions of retained EU law relating to free movement, and

(b) end other EU-derived rights, and repeal other retained EU law, relating to immigration.

Schedule 1, para 2

(2) The Immigration (European Economic Area) Regulations 2016 (S.I. 2016/1052), made under section 2(2) of the European Communities Act 1972 as well as under section 109 of the 2002 Act, are revoked.

Schedule 1, para 6

(1) Any other EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures cease to be recognised and available in domestic law so far as—

(a) they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, any provision made by or under the Immigration Acts (including, and as amended by, this Act), or

(b) they are otherwise capable of affecting the exercise of functions in connection with immigration.

(2) The reference in sub-paragraph (1) to any other EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures is a reference to any rights, powers, liabilities, obligations, restrictions, remedies and procedures which—

(a) continue to be recognised and available in domestic law by virtue of section 4 of the European Union (Withdrawal) Act 2018 (including as they are modified by domestic law from time to time), and

(b) are not those described in paragraph 5 of this Schedule.

(3) The reference in sub-paragraph (1) to provision made by or under the Immigration Acts includes provision made after that sub-paragraph comes into force.

IMMIGRATION RULES:

"APPENDIX EU (FP)"

APPENDIX EU (FAMILY PERMIT)

Purpose

FP1. This Appendix sets out the basis on which a person will, if they apply under it, be granted an entry clearance:

(a) In the form of an EU Settlement Scheme Family Permit – to join a **relevant EEA citizen** or a **qualifying British citizen** in the UK or to accompany them to the UK; or

(b) In the form of an EU Settlement Scheme Travel Permit – to travel to the UK.

FP2. This Appendix has effect in connection with the granting of entry clearance for the purposes of acquiring leave to enter or remain in the UK by virtue of Appendix EU to these Rules.

FP3. The applicant will be granted an entry clearance under this Appendix, valid for the **relevant period**, by an entry clearance officer where:

(a) A valid application has been made in accordance with paragraph FP4;

(b) The applicant meets the eligibility requirements in paragraph FP6(1), (2) or (3); and

(c) The application is not to be refused on grounds of suitability in accordance with paragraph FP7.

FP4. A valid application has been made under this Appendix where:

(a) It has been made using the **required application process**;

(b) The **required proof of identity and nationality** has been provided; and

(c) The **required biometrics** have been provided.

FP5. An application will be rejected as invalid where it does not meet the requirements in paragraph FP4(a) and (b), and will not be considered where it does not meet the requirement in paragraph FP4(c).

FP6. (1) The applicant meets the eligibility requirements for an entry clearance to be granted under this Appendix in the form of an EU Settlement Scheme Family Permit, where the entry clearance officer is satisfied that at the **date of application**:

(a) The applicant is a **specified EEA citizen** or a **non-EEA citizen**;

(b) The applicant is a family member of a relevant EEA citizen;

(c) The relevant EEA citizen is resident in the UK or will be travelling to the UK with the applicant within six months of the date of application;

(d) The applicant will be accompanying the relevant EEA citizen to the UK (or joining them in the UK) within six months of the date of application; and

(e) The applicant ("A") is not the **spouse**, **civil partner** or **durable partner** of a relevant EEA citizen ("B") where a spouse, civil partner or durable partner of A or B has been granted an entry clearance under this Appendix, immediately before or since the specified date held a valid document in that capacity issued under the **EEA Regulations** or has been granted leave to enter or remain in the UK in that capacity under or outside the Immigration Rules.

(2) The applicant meets the eligibility requirements for an entry clearance to be granted under this Appendix in the form of an EU Settlement Scheme Family Permit, where the entry clearance officer is satisfied that at the date of application:

(a) The applicant is a specified EEA citizen or a non-EEA citizen;

(b) The applicant is a **family member of a qualifying British citizen**;

(c) The qualifying British citizen is resident in the UK or will be travelling to the UK with the applicant within six months of the date of application;

(d) The applicant will be accompanying the qualifying British citizen to the UK (or joining them in the UK) within six months of the date of application; and

(e) The applicant ("A") is not the spouse, civil partner or durable partner of a qualifying British citizen ("B") where a spouse, civil partner or durable partner of A or B has been granted an entry clearance under this Appendix, immediately before or since the specified date held a valid document in that capacity issued under the EEA Regulations or has been granted leave to enter or remain in the UK in that capacity under or outside the Immigration Rules.

(3) The applicant meets the eligibility requirements for an entry clearance to be granted under this Appendix in the form of an EU Settlement Scheme Travel Permit, where the entry clearance officer is satisfied that at the date of application:

(a) The applicant is a non-EEA citizen;

(b) The applicant has been granted indefinite leave to enter or remain or limited leave to enter or remain under Appendix EU to these Rules, which has not lapsed or been cancelled, curtailed, revoked or invalidated and

which is evidenced by the Home Office reference number for that grant of leave;

(c) The applicant:

(i) Has been issued with a **relevant document** by the UK under the EEA Regulations, or with a biometric residence card by virtue of having been granted leave under Appendix EU to these Rules; and

(ii) Has reported to the Home Office that that document or card has been lost or stolen or has expired; and

(d) The applicant will be travelling to the UK within six months of the date of application.

FP7. (1) An application made under this Appendix will be refused on grounds of suitability where any of the following apply at the date of decision:

(a) The applicant is subject to a **deportation order** or to a decision to make a deportation order; or

(b) The applicant is subject to an **exclusion order** or **exclusion decision**.

(2) An application made under this Appendix will be refused on grounds of suitability where the applicant's presence in the UK is deemed not to be conducive to the public good because of conduct committed after the specified date.

(3) An application made under this Appendix will be refused on grounds of suitability where at the date of decision the applicant is subject to an **Islands deportation order**.

(3A) An application made under this Appendix may be refused on grounds of suitability where at the date of decision the applicant is subject to an **Islands exclusion decision**.

(4) An application made under this Appendix may be refused on grounds of suitability where, at the date of decision, the entry clearance officer is satisfied that:

(a) It is proportionate to refuse the application where, in relation to the application and whether or not to the applicant's knowledge, false or misleading information, representations or documents have been submitted (including false or misleading information submitted to any person to obtain a document used in support of the application); and the information, representation or documentation is material to the decision whether or not to grant the applicant an entry clearance under this Appendix; or

(b)(i) The applicant:

(aa) Has previously been refused admission to the UK in accordance with regulation 23(1) of the EEA Regulations; or

(bb) Has previously been refused admission to the UK in accordance with regulation 12(1)(a) of the Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020; or

(cc) Had indefinite leave to enter or remain or limited leave to enter or remain granted under Appendix EU to these Rules (or limited leave to enter granted by virtue of having arrived in the UK with an entry clearance that was granted under this Appendix) which was cancelled under paragraph 321B(b)(i) or 321B(b)(ii) of these Rules, under paragraph A3.3. or A3.4.(a) of Annex 3 to this Appendix or under paragraph A3.1. or A3.2.(a) of Annex 3 to Appendix EU; and

(ii) The refusal of the application is justified either:

(aa) In respect of the applicant's conduct committed before the **specified date**, on grounds of public policy, public security or public health in accordance with regulation 27 of the EEA Regulations, irrespective of whether the EEA Regulations apply to that person (except that in regulation 27 for "with a right of permanent residence under regulation 15" and "has a right of permanent residence under regulation 15" read "who has indefinite leave to enter or remain or who meets the requirements of paragraph EU11, EU11A or EU12 of Appendix EU to the Immigration Rules"; and for "an EEA decision" read "a decision under paragraph FP7(4)(b) of Appendix EU (Family Permit) to the Immigration Rules"), and it is proportionate to refuse the application; or

(bb) In respect of conduct committed after the specified date, where the applicant's presence in the UK is deemed not to be conducive to the public good.

(5) The references in this paragraph to an order or decision to which the applicant is subject do not include an order or decision which, at the date of decision on their application under this Appendix, has been set aside or revoked.

FP8. A valid application made under this Appendix which does not meet the requirements for an entry clearance to be granted will be refused.

FP8A. The applicant will be granted an entry clearance under this Appendix, in the form of an EU Settlement Scheme Family Permit, where:

(a) the entry clearance officer is satisfied that the applicant is a **specified EEA family permit case**; and

(b) had the applicant made a valid application under this Appendix, it would not have been refused on grounds of suitability under paragraph FP7.

FP9. (1) Annex 1 sets out definitions which apply to this Appendix. Any provision made elsewhere in the Immigration Rules for those terms, or for other matters for which this Appendix makes provision, does not apply to an application made under this Appendix.

(2) Where this Appendix requires that a document, card or other evidence is valid (or that it remained valid for the period of residence relied upon), or has not been cancelled or invalidated or has not ceased to be effective, it does not matter that the person concerned no longer has the right to enter or reside under the EEA Regulations (or under the equivalent provision in **the Islands)**, on which basis the document, card or other evidence was issued, by virtue of the revocation of those Regulations (or equivalent provision in the Islands).

FP10. Annex 2 applies to the consideration by the entry clearance officer of a valid application made under this Appendix.

…

ANNEX 1 – DEFINITIONS

family member of a relevant EEA citizen	a person who has satisfied the entry clearance officer, included by the **required evidence of family relationship**, that they are: (a) the spouse or civil partner of a relevant EEA citizen, and: (i) the marriage was contracted or the civil partnership was formed before the specified date; or (ii) the applicant was the durable partner of the relevant EEA citizen before the specified date (the definition of 'durable partner' in this table being met before that date rather than at the date of application), and the partnership remained durable at the specified date; or (iii) (if the United Kingdom withdraws from the European Union without a Withdrawal Agreement) the marriage was contracted or the civil partnership was formed after the date and time of withdrawal; or (b) the durable partner of a relevant EEA citizen, and: (i) the partnership was formed and was durable before 31 December 2020; and (ii) the partnership remains durable at the date of application; and (iii) the date of application is after 31 December 2020; or (c) the child or dependent parent of a relevant EEA citizen; or (d) the child or dependent parent of the spouse or civil partner of a relevant EEA citizen, as described in subparagraph (a) above …

...

ANNEX 2 – CONSIDERATION OF A VALID APPLICATION

A2.1. A valid application made under this Appendix will be decided on the basis of:

(a) the information and evidence provided by the applicant, including in response to any request for further information or evidence made by the entry clearance officer; and

(b) any other information or evidence made available to the entry clearance officer (including from other government departments) at the date of decision.

A2.2. (1) For the purposes of deciding whether the applicant meets the eligibility requirements entry clearance, the entry clearance officer may:

(a) request that the applicant provide further information or evidence that they meet those requirements; or

(b) invite the applicant to be interviewed by the entry clearance officer in person, by telephone, by video-telecommunications link or over the internet.

(2) For the purposes of deciding whether the applicant meets the eligibility requirements for entry clearance, the entry clearance officer may:

(a) request that the relevant EEA citizen on whom the applicant relies as being their family member provide information or evidence about their relationship with the applicant; or

(b) invite the relevant EEA citizen on whom the applicant relies as being their family member to be interviewed by the entry clearance officer in person, by telephone, by video-telecommunications link or over the internet.

(3) If the applicant or (as the case may be) the relevant EEA citizen:

(a) fails within a reasonable timeframe specified in the request to provide the
information or evidence requested; or

(b) on at least two occasions, fails to comply with an invitation to attend an
interview in person or with other arrangements to be interviewed,

the Secretary of State may draw any factual inferences about whether the applicant meets the eligibility requirements for indefinite leave to enter or remain or for limited leave to enter or remain as appear appropriate in the circumstances.

(4) The entry clearance officer may decide, following the drawing of a factual inference under sub-paragraph (3), that the applicant does not meet the eligibility requirements for entry clearance.

(5) The entry clearance officer must not decide that the applicant does not meet the eligibility requirements for entry clearance on the sole basis that the applicant or the relevant EEA citizen failed on at least two occasions to comply with an invitation to be interviewed.

“2020 APPEALS REGULATIONS”

IMMIGRATION (CITIZENS’ RIGHTS APPEALS) (EU EXIT) REGULATIONS 2020

Reg. 3.— Right of appeal against decisions relating to leave to enter or remain in the United Kingdom made by virtue of residence scheme immigration rules

(1) A person ("P") may appeal against a decision made on or after exit day —

(a) to vary P's leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules 2 , so that P does not have leave to enter or remain in the United Kingdom,

(b) to cancel P's leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules,

(c) not to grant any leave to enter or remain in the United Kingdom in response to P's relevant application, or

(d) not to grant indefinite leave to enter or remain in the United Kingdom in response to P's relevant application (where limited leave to enter or remain is granted, or P had limited leave to enter or remain when P made the relevant application).

(2) In this regulation, "*relevant application*" means an application for leave to enter or remain in the United Kingdom made under residence scheme immigration rules on or after exit day.

…

Reg. 8 - Grounds of appeal

(1) An appeal under these Regulations must be brought on one or both of the following two grounds.

(2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of—

(a) [Chapter 1, or Article 24(2), 24(3), 25(2) or 25(3) of Chapter 2] , of Title II [, or Article 32(1)(b) of Title III,] of Part 2 of the withdrawal Agreement,

(b) [Chapter 1, or Article 23(2), 23(3), 24(2) or 24(3)], of Title II [, or Article 31(1)(b) of Title III,] of Part 2 of the EEA EFTA separation Agreement, or

(c) Part 2[, or Article 26a(1)(b),] of the Swiss citizens' rights Agreement.

(3) The second ground of appeal is that—

(a) where the decision is mentioned in regulation 3(1)(a) or (b) or 5, it is not in accordance with the provision of the immigration rules by virtue of which it was made;

(b) where the decision is mentioned in regulation 3(1)(c) or (d), it is not in accordance with residence scheme immigration rules;

(c) where the decision is mentioned in regulation 4, it is not in accordance with section 76(1) or (2) of the 2002 Act (as the case may be);

(d) where the decision is mentioned in regulation 6, it is not in accordance with section 3(5) or (6) of the 1971 Act (as the case may be) [;]

...

Reg. 9 - Matters to be considered by the relevant authority

(1) If an appellant makes a section 120 statement, the relevant authority must consider any matter raised in that statement which constitutes a specified ground of appeal against the decision appealed against. For the purposes of this paragraph, a "*specified ground of appeal*" is a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act.

(2) In this regulation, "*section 120 statement*" means a statement made under section 120 of the 2002 Act and includes any statement made under that section, as applied by Schedule 1 or 2 to these Regulations.

(3) For the purposes of this regulation, it does not matter whether a section 120 statement is made before or after the appeal under these Regulations is commenced.

(4) The relevant authority may also consider any matter which it thinks relevant to the substance of the decision appealed against, including a matter arising after the date of the decision.

(5) But the relevant authority must not consider a new matter without the consent of the Secretary of State.

(6) A matter is a "new matter" if—

(a) it constitutes a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act, and

(b) the Secretary of State has not previously considered the matter in the context of—

(i) the decision appealed against under these Regulations, or
(ii) a section 120 statement made by the appellant.

...

“2020 CONSEQUENTIAL REGULATIONS”

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) ACT 2020 (CONSEQUENTIAL, SAVING, TRANSITIONAL AND TRANSITORY PROVISIONS) (EU EXIT) REGULATIONS 2020

Schedule 3, para 3 - Pending applications for documentation under the EEA Regulations 2016

(1) Regulation 12 of the EEA Regulations 2016 (issue of EEA family permit) 1 , continues to apply for the purposes of considering and, where appropriate, granting an application for a family permit which was validly made in accordance with the EEA Regulations 2016 before commencement day.

“2016 REGULATIONS”

IMMIGRATION (EUROPEAN ECONOMIC AREA) REGULATIONS 2016

“Family member”

7.— (1) In these Regulations, “family member” means, in relation to a person (“A”)—

(a) A’s spouse or civil partner;
(b) A’s direct descendants, or the direct descendants of A’s spouse or civil partner who are either—

(i) aged under 21; or
(ii) dependants of A, or of A’s spouse or civil partner;

(c) dependent direct relatives in A’s ascending line, or in that of A’s spouse or civil partner.

(2) Where A is a student residing in the United Kingdom otherwise than under regulation 13 (initial right of residence), a person is not a family member of A under paragraph (1)(b) or (c) unless—

(a) in the case of paragraph (1)(b), the person is the dependent child of A or of A’s spouse or civil partner; or

(b) A also falls within one of the other categories of qualified person mentioned in regulation 6(1).

(3) A person (“B”) who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card must be treated as a family member of A, provided —

(a) B continues to satisfy the conditions in regulation 8(2), (3), (4) or (5); and
(b) the EEA family permit, registration certificate or residence card remains in force.

(4) A must be an EEA national unless regulation 9 applies (family members of British citizens).

“Extended family member”

8.— (1) In these Regulations “extended family member” means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies a condition in paragraph (2), (3), (4) or (5).

(2) The condition in this paragraph is that the person is—

(a) a relative of an EEA national; and

(b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national's household; and either—

(i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or

(ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household.

(3) The condition in this paragraph is that the person is a relative of an EEA national and on serious health grounds, strictly requires the personal care of the EEA national.

(4) The condition in this paragraph is that the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national.

(5) The condition in this paragraph is that the person is the partner (other than a civil partner) of, and in a durable relationship with, an EEA national, and is able to prove this to the decision maker.

(6) In these Regulations, "relevant EEA national" means, in relation to an extended family member—

(a) referred to in paragraph (2), (3) or (4), the EEA national to whom the extended family member is related;

(b) referred to in paragraph (5), the EEA national who is the durable partner of the extended family member.

(7) In paragraphs (2) and (3), "relative of an EEA national" includes a relative of the spouse or civil partner of an EEA national where on the basis of being an extended family member a person—

(a) has prior to the 1st February 2017 been issued with—

(i) an EEA family permit;
(ii) a registration certificate; or
(iii) a residence card; and

(b) has since the most recent issue of a document satisfying sub paragraph (a) been continuously resident in the United Kingdom.

Issue of EEA family permit

12 (4) An entry clearance officer may issue an EEA family permit to an extended family member of an EEA national (the relevant EEA national) who applies for one if—

(a) the relevant EEA national satisfies the condition in paragraph (1)(a);

(b) the extended family member wants to accompany the relevant EEA national to the United Kingdom or to join that EEA national there; and

(c) in all the circumstances, it appears to the entry clearance officer appropriate to issue the EEA family permit.

(5) Where an entry clearance officer receives an application under paragraph (4) an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the entry clearance officer must give reasons justifying the refusal unless this is contrary to the interests of national security.

18 (4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if—

(a) the application is accompanied or joined by a valid passport;

(b) the relevant EEA national is a qualified person or an EEA national with a right of permanent residence under regulation 15; and

(c) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.

(5) Where the Secretary of State receives an application under paragraph (4) an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the Secretary of State must give reasons justifying the refusal unless this is contrary to the interests of national security.

“EU CHARTER”

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Preamble

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

ARTICLE 7

RESPECT FOR PRIVATE AND FAMILY LIFE

Everyone has the right to respect for his or her private and family life, home and communications.

ARTICLE 24

THE RIGHTS OF THE CHILD 1.

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

BORDERS, CITIZENSHIP AND IMMIGRATION ACT 2009

55. Duty regarding the welfare of children

(1) The Secretary of State must make arrangements for ensuring that —

(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and

(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

(2) The functions referred to in subsection (1) are—

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

(c) any general customs function of the Secretary of State;

(d) any customs function conferred on a designated customs official.

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

(4) The Director of Border Revenue must make arrangements for ensuring that—

(a) the Director's functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and

(b) any services provided by another person pursuant to arrangements made by the Director in the discharge of such a function are provided having regard to that need.

(5) A person exercising a function of the Director of Border Revenue must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (4).

(6) In this section—

"children" means persons who are under the age of 18;

"customs function", "designated customs official" and "general customs function" have the meanings given by Part 1.

(7) A reference in an enactment (other than this Act) to the Immigration Acts includes a reference to this section.

(8) Section 21 of the UK Borders Act 2007 (c. 30) (children) ceases to have effect.